

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Before Upper Tribunal Judge Gray

CPIP/24/2016

Decision: This appeal by the claimant is dismissed.

The decision of the First-tier Tribunal sitting at Derby Beckett Street and made on 17 August 2015 under reference SC 309/15/00011 is correct as a matter of law and it stands.

REASONS

Background

1. This case concerns entitlement to a Personal Independence Payment (PIP). The appellant, who suffers from chronic fatigue syndrome, claimed PIP on 2 July 2013 when he was aged 40. A decision was made on 13 November 2014 awarding him 6 points under the activities of daily living, and 4 points in respect of the mobility activities. The points scored recognised that he had difficulties in these areas, but, being less than 8 points in each category were insufficient for an award to be made of either component of PIP. An appeal was lodged, and a final hearing took place at the First Tier Tribunal (FTT) on 17 August 2015.
2. An argument raised at that stage was that, in addition to the 6 points already awarded under the daily living category, the appellant was entitled to a further 2 points under 8(b) the descriptor relating to vision. As a teenager he had corrective surgery on his left eye in the form of a retinal implant, which had remained in place since, although in 2013 a further procedure had taken place on that eye to repair a retinal detachment. The argument was that the internal and permanent retinal implant was an aid or appliance under the terms of the Personal Independence Payment Regulations 2013 (the PIP regulations). It failed before the FTT, which confirmed the decision of the Secretary of State.
3. The presiding judge later issued a Statement of Reasons for the decision made, and permission to appeal was sought from District Tribunal Judge Marston on the basis of the ruling as to the status of the retinal implant within the meaning of the legislation. He identified the point of law as arguable and granted permission to appeal, observing that the issue of whether this or other surgical implants such as pacemakers, cochlear

implants, stents and joints might amount to aids or appliances is of broader importance and Upper Tribunal guidance would assist the First-Tier Tribunal.

Proceedings in the Upper Tribunal

4. I directed submissions, and having considered those originally filed I asked for more focussed argument as to whether such an implant might be a prosthesis, given regulation 2 of the PIP regulations in which an aid or appliance is specifically defined to include a prosthesis; I pointed out the wide medical use of the term.
5. An oral hearing took place in central London on 3 February 2017. The appellant, who did not attend the hearing, was represented by Ms Rippin and Mr Booton of Derbyshire Welfare Rights; Ms Scolding, counsel, represented the Secretary of State. I am grateful to them all for their helpful submissions both on paper and orally in this most interesting case.

The legal framework

6. I set out the statutory background, largely from Ms Scolding's comprehensive submission.
7. Personal Independence Payments were established under part 4 of the Welfare Reform Act 2012, section 77 providing for the allowance in two components, daily living and mobility.
8. Section 78 relates to the daily living component and reads
 - (1) *A person is entitled to the daily living component at the standard rate if –*
 - (a) *the person's ability to carry out daily living activities is limited by the person's physical or mental condition; and*
 - (b) *the person meets the required period condition.*
 - (2) *A person is entitled to the daily living component at the enhanced rate if –*
 - (a) *the person's ability to carry out daily living activities is severely limited by the person's physical or mental condition; and*
 - (b) *the person meets the required period condition.*
 - (3) *In this section, in relation to the daily living component –*
 - (a) *"the standard rate" means such weekly rate as may be prescribed;*
 - (b) *"the enhanced rate" means such weekly rate as may be prescribed.*
 - (4) *In this Part "daily living activities" means such activities as may be prescribed for the purposes of this section.*
 - (5) *See sections 80 and 81 for provision about determining –*
 - (a) *whether the requirements of subsection (1) (a) or (2) (a) above are met;*

(b) whether a person meets “the required period condition” for the purposes of subsection (1) (b) or (2) (b) above

9. Section 79 makes similar provisions with respect to the mobility component. This was not in issue and I do not need to set out the provisions.
10. Section 80 deals with the ability to carry out daily living activities or mobility activities. It reads

(1) For the purposes of this Part, the following questions are to be determined in accordance with regulations –

- (a) whether a person’s ability to carry out daily living activities is limited by the person’s physical or mental condition;*
- (b) whether a person’s ability to carry out daily living activities is severely limited by the person’s physical or mental condition;*
- (c) whether a person’s ability to carry out mobility activities is limited by the person’s physical or mental condition;*
- (d) whether a person’s ability to carry out mobility activities is severely limited by the person’s physical or mental condition.*

(2) omitted as not relevant

(3) regulations under this section –

- (a) must provide for the questions mentioned in subsections (1) and (2) to be determined, except in prescribed circumstances, on the basis of an assessment (or repeated assessments) of the person;*
- (b) must provide for the way in which an assessment is to be carried out;*

11. It is the Social Security (Personal Independence Regulations) 2013 (‘the PIP regulations’ or ‘the regulations’ hereafter) that have been enacted under the provisions of that section. Schedule 1 sets out a list of activities in relation to daily living and, separately, mobility, together with descriptors which calibrate the severity of the person’s disability in relation to each activity. Broadly the more difficulty that a person has in accomplishing an activity or the greater the level of assistance required to do so, the higher the points scored. Relevant here is activity 8:

Reading and understanding signs, symbols and words

- a. Can read and understand basic and complex written information either are needed or using spectacles or contact lenses (0 points)*
- b. needs to use an aid or appliance, other than spectacles or contact lenses, to be able to read or understand either basic or complex written information (2 points)*
- c. need prompting to be able to read or understand complex written information (2 points)*

- d. *need prompting to be able to read or understand basic written information (4 points)*
- e. *cannot read or understand signs, symbols or words at all (8 points)*
12. There are certain definitions which must be employed in assessing a person's capability in relation to the activities.
13. Regulation 2 of the PIP regulations defines an "*aid or appliance*" as
- a. *...any device which improves provides or replaces C's [C being the claimant] impaired physical or mental function; and*
- b. *includes a prosthesis*
14. Regulation 4, inter alia, provides that
- 4(2) *C's ability to carry out an activity is to be assessed-*
- (a) *on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or*
- (b) *as if C were wearing or using any aid or appliance which C could be reasonably expected to wear or use*
15. Regulation 4 (2)(A) provides that:
- Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so-*
- (a) *safely*
- (b) *to an acceptable standard*
- (c) *repeatedly*
- (d) *within a reasonable time period*
16. There are in addition definitions of three of those concepts in that regulation: the concept of something being performed "to an acceptable standard" is not further defined.
17. "Safely" is defined by regulation 4 (4) (a) as "*in a manner unlikely to cause harm to C or another person, either during or after completion of the activity*".
18. "Repeatedly" means "*as often as the activity being assessed is reasonably required to be completed*" (regulation 4 (4) (b))
19. And "within a reasonable time period" means "*no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person is activity to carry out the activity in question would normally take to complete that activity*" (regulation 4 (4) (c)).

20. Also, within the schedule:

"Basic written information" means signs, symbols and dates written or printed standard sized text in C's native language.

"Complex written information" means more than one sentence of written or printed standard sized text in C's native language.

"Read" includes signs, symbols and words and does not include read Braille.

"Aided" means with-

- (a) the use of an aid or appliance; or*
- (b) supervision, prompting or assistance.*

"Unaided" means without –

- (a) the use of an aid or appliance or*
- (b) supervision prompting or assistance.*

Factual Matters

21. At the hearing the parties indicated that the following matters were agreed.

22. The operation inserting the lens into the appellant's left eye took place in 1987. Between January 2004 and May 2013 he had not seen an ophthalmologist, but complaints to his GP of an ache behind that eye in March 2013 resulted in a referral, and following an appointment in May that year the Consultant Ophthalmic Surgeon reported that he had adequate vision, and his lens seemed normal. Later on that month, however, his retina detached and he required further treatment. That was by means of an injection of gas to reinflate the pressure behind the retina, sealing the detachment. The repair was effective, and other than an attendance at the Accident and Emergency Department in March 2015 where he complained of left eye pain and was discharged with some ointment, he has not required treatment.

23. His vision with the internal lens correcting his eyesight is 6/9 in that eye. His vision in his right eye is 6/6. In December 2013, the ophthalmic assessment was of 6/6.75 in the left eye. Using spectacles (which are ignored for the purposes of any PIP assessment) he is legally able to, and indeed does, drive.

The importance of the factual position

24. The accepted evidence would not lead to the implication that there is any functional impairment in the appellant's bilateral vision. However, if his retinal implant is considered an aid or an appliance then when reading using both eyes the appellant must be said to be doing so using such a device in that he is unable to avoid using the implant. The FTT decided that the implant did not amount to an aid or appliance, however, a finding

was also made that the appellant was able to read within the terms of descriptor 8 using his right eye alone. I respect that finding because it is made by a tribunal with medical expertise; it was also grounded in the appellant's oral evidence to the FTT that his right eye was "OK with glasses", and that he had been told by the DVLA that he could drive if one eye was satisfactory with glasses. The tribunal explained this, referring to the report which confirmed him to have 6/6 vision in his right eye.

25. It was argued before me that the FTT findings on this issue were flawed because the provisions of regulation 4 would prevent the satisfaction of the zero point "baseline" criteria; that is to say the appellant would be unable to read the relevant information with one eye to an acceptable standard, repeatedly or within a reasonable time period. I do not accept that because it is a factual argument that was quite reasonably rejected by the FTT; it is inherently improbable that a person with a 6/6 vision in one eye could not, using that eye alone, read a complex sentence however frequently the action needed to be repeated.
26. Accordingly, although it describes a somewhat artificial position where the left eye is covered for no apparent reason, the baseline descriptor applies: the appellant is able to read and understand basic and complex written information either unaided or using spectacles or contact lenses, and scores no points under activity 8.
27. Since the appellant fails to score sufficient points for an award on the facts, my conclusions on the issue of whether his retinal implant is an aid or appliance are unnecessary for the purposes of the decision. Having had the benefit of argument, however, it is appropriate that I make some obiter, or by the way observations for the benefit of the FTT in its application of this legislation.
28. Prior to dealing with that, the main issue, a question arose as to whether a claimant with a working implant might fail an initial hurdle prior to the schedule 1 assessment.

Section 78- an initial hurdle?

29. Does someone's ability to carry out activities remain limited by a physical condition where that condition has been effectively eliminated or put on hold by the insertion into their body of a device? If not, would that person fail at the 'hurdle' put in place by section 78 (1) or (2) that an award is available only if *'the person's ability to carry out daily living activities is limited by the person's physical or mental condition'*?
30. In my judgment the section does not put in place a hurdle to be overcome. I accept the appellant's argument that at that stage there is no consideration of any limitation. Section 78 is a gateway provision which allows entry into the schedule 1 assessment process under which it is established whether, due to a physical or mental condition, function is limited in any of the areas of activity, and to what extent. That is clear from

reading section 78 (and that part of section 79 which replicates section 78 although I have not needed to consider mobility) with section 80. The position is not dissimilar to the severe disability “condition” in DLA which was said to be not a precondition; whether or not there was severe disability depended upon the level of functional impairment. (*R(DLA)3/06*)

31. Accordingly there is no initial hurdle, or ‘preliminary sift’; the assessment via the activities set out in the schedule will decide whether or not there is functional impairment, and if so, whether that is referable to a physical or mental condition.
32. In any event the argument that a physical condition has been “cured” by an internal device, or that the condition is not present while it functions, does not commended itself to me. I find it difficult to conclude that somebody who has a pacemaker or stent fitted, which is operating properly, does not have “a heart condition”. The extent to which it remains a disabling condition is assessed under the schedule 1 descriptors.

The main arguments of the parties

The appellant

33. The appellant argues that the structure of PIP takes into account the effective use of an aid or appliance by awarding points where the activity can be accomplished with such use, and, given the definitions, that should include an internal device leaving the schedule assessment to determine the level of disability in the usual way. The activities in the schedule comprise a practical assessment of ability using aids of all types.
34. In oral argument the proposition that this leads to absurdity was strongly countered: the government consultations on introducing PIP stressed its keenness to improve levels of independence by taking into account the use of aids and appliances and compensating for their need by the scoring of points which it was envisaged may lead to a financial award. The legislation as drafted is workable, specifically allowing for consideration of prostheses that might well result in an award. The definition of an aid or appliance in regulation 2 as “*any device which improves provides or replaces C’s impaired physical or mental function*” is clear, and implanted devices plainly fall into that description. I am urged to accept the plain meaning of the definition within the totality of the scheme on the basis that I am not best placed to make what is said to be a change to the regulations. I should apply them as they are written; should that not reflect Parliamentary intention, the legislature can amend them.

The Secretary of State

35. Ms Scolding did not disagree as to the Parliamentary intention that PIP should advance independent living or as to the role of aids and appliances within that aim, but argued that despite the relevant definitions appearing to suggest that an implant might be an aid or appliance it is incorrect to

award points under descriptors where an implant has resulted in a permanent or semi-permanent situation of no functional loss. She contrasts this with an external aid such as a walking stick, which provides only temporary assistance and which is under the control of the user.

36. The contrary position, she says is a legal absurdity, which entitles me to consider documents shedding light on legislative intent under the *Pepper – v- Hart* doctrine. ¹ She produced a number of papers including the Government's responses in both April 2011 and December 2012 to the consultations on Disability Living Allowance reform and the PIP assessment criteria, and the explanatory note to the second draft of the assessment regulations produced in November 2011.
37. The initial proposals published in 2010 ²stated that the purpose of the DLA replacement benefit was to support those who have additional challenges due to disability, prioritising support to those with the greatest challenges, who are likely to experience higher costs.
38. She pointed to the progression of the regulations, which had had input from specialists in disability social care and health. ³
39. The legislation as passed took into account the responses to the two consultations, but did not resile from the initial principles.
40. She referred to the Explanatory Memorandum to the PIP regulations⁴, at paragraph 4 in particular, in which it is said that the new benefit is 'designed to help disabled people meet the additional costs arising from a long-term health condition or disability'. To construe aids and appliances as including implants would, she argued, contravene those principles.

My consideration of the arguments

41. I am conscious of the fact that many PIP claimants have multiple disabilities, and I understand the argument that to score points for a retinal implant recognises an underlying condition. Implanted devices may not perfectly replicate the malfunctioning organ or body part, and in this case the appellant did suffer a further retinal detachment requiring repair.
42. Regulation 4 of the PIP regulations provides that a person's ability to carry out an activity is to be assessed whilst using any aid or appliance that the person normally uses; if an implant is an aid or appliance then the person normally uses it. The argument that a retinal implant is a device which improves provides or replaces physical function, and is therefore an aid or appliance under regulation 2 is, in straightforward language terms,

¹ *Pepper-v-Hart* [1992] UKHL 3

² Disability Living Allowance reform December 2010 Cm 7984

³ Pip initial draft of assessment criteria, a technical note May 2011

⁴ The Social Security (Personal Independence Payment) Regulations 2013 SI 2013/377)

unimpeachable, but an example suggests that the literal construction of regulation 2 may produce absurdity.

43. Consider an implanted device such as an artificial heart valve or a stent. Without it someone with a serious heart condition may not be able to carry out any of the physical activities in the schedule, but with it in place, unless the device fails, they may have no functional difficulty. If the appellant's contention is correct they would score points for any descriptor which allows aids or appliances to be taken into account, amassing 13 points under the schedule for 'using' the appliance whilst preparing food, bathing, dressing and so forth and be entitled to the enhanced award for daily living activities despite having no actual problem with any of those things. That position entitles me to take into account the reports produced by Ms Scolding which provide evidence of the policy intention in introducing PIP.
44. I accept that the additional material shows that PIP was designed to provide financial assistance for those with long-term functional disability, prioritising those with greater disablement as they face more barriers to independent living and full engagement in society. The result in my example above cannot be the intended outcome. If it were the assessment would be one not of existing disability, but of potential vulnerability. It would conflict with the stated aims; further the cost would be enormous, and another stated purpose in the move from DLA to PIP was to save money by targeting the benefit at those who are more disabled.
45. It may be helpful to draw the distinction, although the Parliamentary material does not, between impairment and disability. I do so by way of another example. Someone with only one kidney, whether congenitally or through donation to another, has impairment; two kidneys are usual and preferable, but so long as the single kidney functions there is no disability; that is why transplant from a living donor is possible. Only if the single kidney fails will disability result. PIP is intended to assess the function in the latter position, not the former.
46. I will deal with the specific inclusion of 'a prosthesis' in regulation 2(b). Ms Scolding accepted that the meaning of the word 'prosthesis' is wide, in both the dictionary definition and in medical usage. I recall, however, the words of Lord Upjohn in *Customs and Excise Commissioners v Top Ten Promotions Ltd* [1969] 1 WLR 1163, at 1171:

It is highly dangerous, if not impossible, to attempt to place an accurate definition upon a word in common use; you can look up examples of its many uses if you want to in the Oxford Dictionary but that does not help on definition; in fact it probably only shows that the word normally defies definition. The task of the court in construing statutory language such as that which is before your Lordships is to look at the mischief at which the Act is directed and then, in that light, to consider whether as a matter of common sense and every day usage the known, proved or admitted or

properly inferred facts of the particular case bring the case within the ordinary meaning of the words used by Parliament.

47. In normal usage the term 'prosthesis' tends to apply to replacement limbs. In all its senses, however, it seems to me that a prosthesis falls squarely into the definition under regulation 2(a) of an aid or appliance being a *'device which improves, provides or replaces C's impaired physical or mental function'*. I find that the rider to that definition *'and (b) includes a prosthesis'*, the meaning of which was (at my behest) included in argument prior to the hearing does not add to that, and its specific mention does not alter the view I express above. I am persuaded that it was included for clarity or emphasis (the use of the word 'and' suggesting that) possibly to ensure that amputees were considered to be amongst the more disabled group that the payment is designed to benefit, despite (or perhaps because of) the ability of some to adapt so well to their disability as to be able to run and jump competitively. It cannot have been intended either to be an adoption of the dictionary definition, or of the use of the term in the medical sense as including, for example and not exclusively, dental implants, stents, heart valves, replacement joints and retinal implants.
48. In expressing this view I am not saying that implants should be ignored; they may indicate a serious medical condition, but of themselves they are not point scoring as aids or appliances. Where functional disability remains despite an implant the extent will be assessed under the activities in the schedule.
49. As I have explained these remarks do not form part of my decision, nonetheless I add another note of caution. During argument cochlear implants were mentioned, and in view of the collective lack of knowledge in the court as to the way in which such devices operated, whether they were removable, for example, and there being likely variation as to effectiveness both due to the type of hearing loss and environmental factors, it is prudent for me to exclude them from my observations entirely.

Paula Gray

Judge of the Upper Tribunal

Signed on the original on 20 February 2017